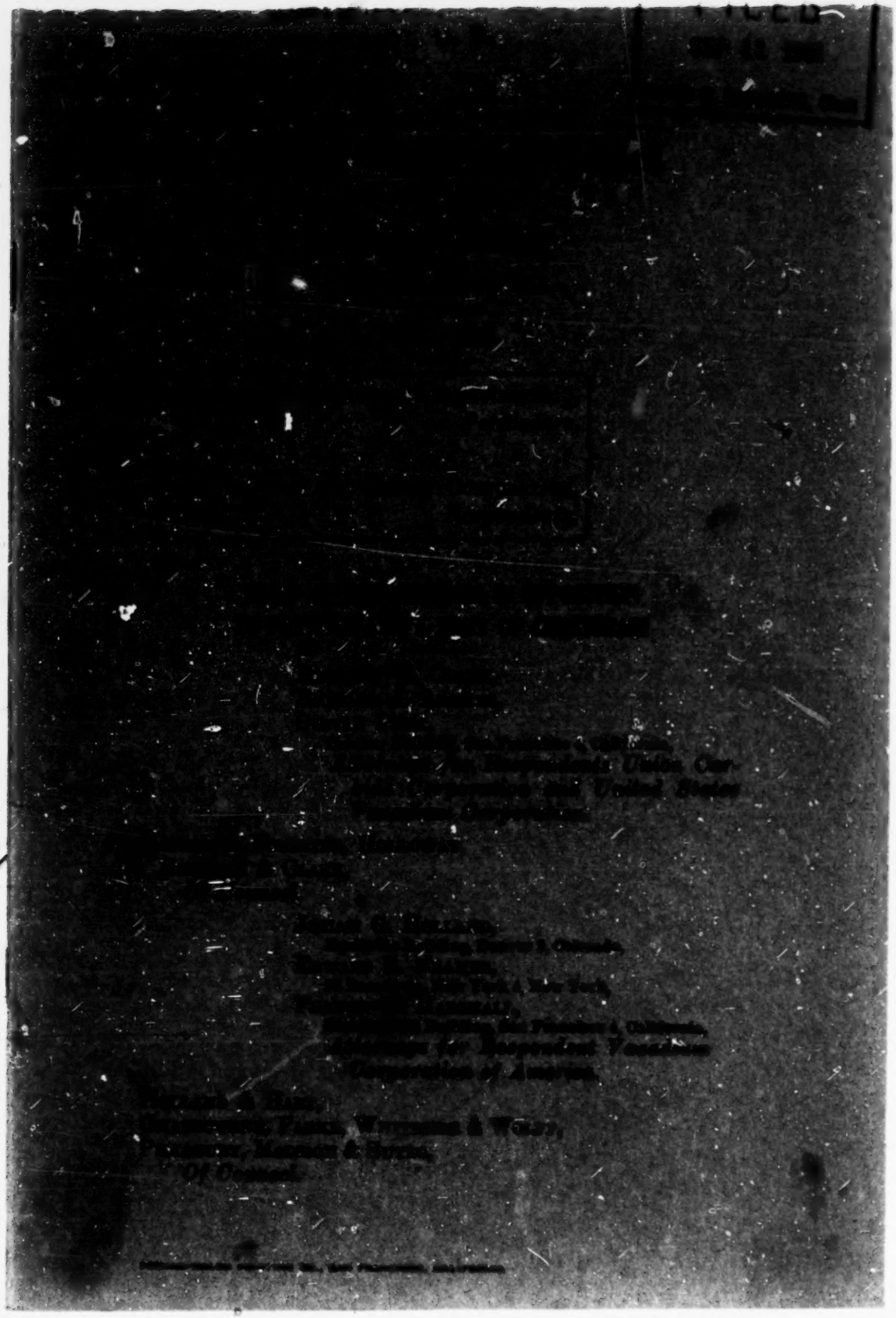

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## Texts

# In the Supreme Court
OF THE
# United States

October Term, 1961

No. 304

| | |
|---|---|
| Continental Ore Company, a partnership, et al., | *Petitioners,* |
| **vs.** | |
| Union Carbide and Carbon Corporation, et al., | *Respondents.* |

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### OPINION BELOW

The opinion of the Court of Appeals is reported at 289 F.2d 86 and is reprinted as Appendix A to the petition. The District Court issued no opinion.

## QUESTION PRESENTED

The only question presented upon this petition is whether the court below correctly affirmed a judgment for defendants entered upon a jury verdict, upon the ground that plaintiffs wholly failed to prove any injury and therefore no error, if found, could have affected the judgment.

The case is the common one of a failure of proof, where a claim collapses in the face of the claimant's own contemporaneous records. No principle of antitrust law is involved, and there is no conflict of authority.

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## STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act (cited in full and quoted in Appendix D to the Petition) and in addition the Act of May 24, 1949, Chapter 139, Section 110, 63 Stat. 105 (28 U.S.C. Sec. 2111), together with Rule 61 of the Federal Rules of Civil Procedure (Appendix A hereto).

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## STATEMENT OF THE CASE

Petitioners brought this suit under the Sherman and Clayton Acts, claiming that they were forced out of the business of producing and selling vanadium by respondents' alleged refusals to sell and respondents' alleged interferences with their other sources of supply.

The action was begun more than 12 years ago on July 15, 1949 (R. 25). It followed, and purported to rely on a

criminal case against the same group of defendants filed on September 2, 1948, entitled *United States v. Union Carbide and Carbon Corporation, et al.*, No. 11678, in the United States District Court for the District of Colorado. On June 4, 1957, however, the Government action was terminated, after a jury trial, by the acquittal of all defendants. No civil suit was brought by the Government at any time.

On June 2, 1958, the present case was brought to trial in the United States District Court for the Northern District of California (R. 110). The defendants in the trial court, respondents here, moved for a directed verdict "on the ground that upon the facts and the law the plaintiff has shown no right to relief" (R. 1989), and the court reserved its ruling on the motion (R. 1989). Thereafter, the jury returned a verdict for the defendants (R. 2051) and the trial court noted its concurrence with such verdict (R. 2052). Judgment was entered upon the verdict (R. 104-05) and plaintiffs appealed (R. 105-06).

Upon appeal to the Court of Appeals for the Ninth Circuit, the "complete record and all of the proceedings and evidence in the above entitled action" were designated by petitioners, and the parties designated for printing the entire transcript of testimony (see Appendix B hereto) and stipulated that all exhibits not printed could be considered on the appeal (R. 2057).[1] Following the submission of briefs and oral argument, the Court requested supplemental "memoranda . . . pointing to every specific place

[1]Thus petitioners' intimation that the court below did not have the complete record before it (Pet. 6) is misleading. Nothing material to the decision was lacking.

in the record where there is testimony or documentary evidence which will show or tend to show" the cause of termination of each of petitioners' ventures in vanadium (Appendix C hereto) and such briefs were furnished by both sides. Thereafter it entered judgment of affirmance on March 22, 1961 (R. 2583). Rehearing was denied on May 15, 1961 (R. 2584).

The Court in its opinion, written by Judge Magruder of the Court of Appeals for the First Circuit, considered all evidence offered, whether it was received or not. It assumed, without attempting to decide, that antitrust violations were proved, but concluded, in the light of the undisputed records and admissions, that petitioners' claims of injuries caused thereby were without basis in fact.

**The Vanadium Industry**

Vanadium is an alloy used to harden steel. It is found domestically in the same ores as is uranium, in a four-state area known as the Colorado Plateau. The ores are milled into vanadium oxide and the oxide then converted by a smelting process into ferrovanadium, the finished product, which is then added to the steel.

By reason of its competition with other and cheaper alloys, vanadium was a declining industry before World War II (R. 146, 157, 1682). In the early stages of the war, however, it enjoyed a sudden spurt in demand, principally for weapons (R. 160, 189-90, 1526) which in time produced a glut of the material by 1944 (R. 527, 969-70).

The industry was easy to enter. The ore was plentiful (R. 139) and, as petitioners conceded, anyone could find

it, mine it and mill it (R. 1199, 1553). Alternatively, anyone could simply buy vanadium oxide already milled, as petitioners readily discovered, and make ferrovanadium at will.[2]

**The Petitioners**

Continental Ore Company was a partnership composed of the petitioners Henry J. Leir, his wife, and his mother-in-law. During the period in suit, 1938 to 1949, Continental was engaged in trading in a number of ores and minerals, vanadium being a small part of its activities (R. 1083-86, 1103-04). It hired no metallurgists for its staff (R. 910-11) and invested nothing of consequence in the vanadium industry (R. 1211-15). It sought, during the war shortage, (1) to trade in vanadium oxide and sell it for a profit, (2) to buy vanadium oxide, induce others to process it into ferrovanadium with their capital and facilities and then sell the product, and (3) to buy vanadium oxide, repackage it and sell it under the trade name "Van-Ex" at a price greater than that permitted by the Office of Price Administration. These were the petitioners' activities until 1944, when, the war shortage being over, they lost interest in vanadium and traded in it thereafter only sporadically.

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[2]The falsity of the "monopoly" issue was apparent at trial. Petitioners' witness on the subject, Blair Burwell, a disaffected former officer of a Carbide subsidiary (R. 135, 158, 232-34, 289-90), admitted to being a competitor of respondents (R. 516-18) and to having close financial connections with the petitioner Leir (R. 519, 541-42). The alleged monopoly was never "conceded" or "confessed" as the petition misleadingly states, *passim*, but on the contrary was negatived by the undisputed facts and, indeed, by petitioners' own experience in the industry.

**The Respondents**

Respondents are Union Carbide Corporation, formerly Union Carbide and Carbon Corporation ("Carbide"), United States Vanadium Corporation, a Carbide subsidiary ("USV") and Vanadium Corporation of America ("VCA"). It was undisputed that VCA and the Carbide group had long been bitter competitors on the Plateau in the vanadium business (R. 491, 504-05, 509). They were leading companies, but 40 or 50 others competed on the Plateau (R. 390) and one of them (Shattuck) had "far more ore than the Vanadium Corporation did" (R. 509). Respondents were, unlike the petitioners, in the vanadium business on a basis of permanent investment and sustained research and development (R. 1689, 145, 328, 1553-55).

**Petitioners' Claims of Injury**

The claim, as made out in the complaint (R. 3-25), was that respondents frustrated Continental's ventures in the vanadium field in five particulars: the Apex contract, the Van-Ex venture in the United States, the Van-Ex venture in Canada, the Climax contract, and the Imperial Paper contract. The court below in its opinion carefully reviewed each one and concluded that as to each there had been a complete lack of evidence. The gist of the complaint—the claimed inadequacy of petitioners' supplies of vanadium oxide for such ventures—evaporated in the light of petitioners' own records and their own admissions, and the Court could find no evidence of any other cause of injury involving the respondents.

**The Apex Contract—1938-1942**

Petitioners' first claim was that they could not get adequate supplies for their contract with the Apex Smelting Company (Complaint, para. 33, R. 18).

The contract, made in 1938, provided that Apex was to make ferrovanadium, while Continental secured the raw materials and sold the finished product (Ex. 117, R. 2187-2201, 1050). Apex terminated it in June 1942, the operation having failed for reasons having nothing to do with respondents.

The proof showed that supplies were never a problem. Continental was furnished half its supplies in 1939 by Electro Metallurgical Sales Corporation ("EMS"), a Carbide subsidiary (Ex. U-5-L, R. 1227-30, Ex. 119)[3] but made no further offers to buy from any Carbide company for the next two years.[4] VCA also offered to sell to Continental for export at its export price, but Continental refused the offer.[5]

In 1939 and 1940 Continental was not only rejecting supplies from other suppliers (Ex. U-5-K, R. 2474-84, 1219) but was reselling excess vanadium oxide at a profit to Europe, which it did until an embargo took effect

[3]Omitted from petitioners' table (Pet. 29). Continental chose to order through a man called Poliakoff, but its books show that it paid EMS directly (R. 1228).

[4]Continental made no request in October 1940, as stated in the table (Pet. 29), but rather Apex wrote to say it understood from an EMS salesman that EMS was taking no new accounts (Ex. 128, not printed).

[5]Omitted from petitioners' table (Pet. 29). VCA, as it advised Continental, did not sell domestically through brokers, but it offered to sell at its export price (Ex. 132, R. 2258, 1245, 1966-67).

in July 1940 (R. 1233-34). Even after Apex started to produce commercially in August or September 1940 (R. 1062, 1124, 1234), Continental continued to resell domestically to others than Apex, disposing of some 30,000 pounds of vanadium oxide in late 1940 and early 1941 (Ex. U-5-N, R. 1236-37). Continental's president, the petitioner Leir, testified that he was not concerned about supplies at the time (R. 1237).

Continental at the same time was suggesting that its associate Apex should commit itself to suppliers, but Apex was unwilling. Apex refused offers of supply contracts from Blanding Mines in the fall of 1940 (R. 1153-54, Ex. V-2-I, R. 1698-1700), from the Morrison mill in December 1940 (Ex. V-1-O, R. 1140-42; Ex. V-1-K, R. 2501, 1133), from the Ackerman mill in the spring of 1941 (Ex. V-1-P, R. 1142-45) and from National Vanadium Company in September 1941 (Ex. V-1-Q, R. 2507-13, 1145, Ex. V-1-R, R. 2514-15, 1151, 1152-53). These offers amounted to many times the actual production of Apex (Ex. 119, R. 2212, 1090) and far more than even its planned or paper capacity (R. 856, 1113).

Apex in late 1941 advised petitioners it wanted to terminate the contract, for a series of reasons unrelated to supplies (Ex. V-1-S, R. 1154-57). It then rejected a shipment from Nisley and Wilson (R. 669), and shortly afterwards, in February 1942, stopped shipments altogether (Ex. V-2-E, R. 1283-84), having then on hand some 50,000 pounds of vanadium oxide (R. 1287, 1331, 1342). Leir admitted at trial that further supplies were then available (R. 1175). The only Apex officer who testified (petitioners called none) made clear, as does Apex's own summary in

its final letter, that the Apex termination in June 1942 had nothing to do with supplies; it had merely proved to be a losing and highly unsatisfactory arrangement for Apex (Ex. V-2-B, R. 1187-91, 2520-22, 1287, 1290-91, Ex. V-2-G, R. 1291-95, 1361-62).

Petitioners made some claim that VCA's purchase of a portion of the Apex equipment constituted an interference with the Apex-Continental association. The proof, however, was that Apex decided to dispose of its equipment simply because it was going out of the vanadium business (R. 1284-88) and that the same equipment was offered to petitioners first, who declined to purchase it (R. 1337-38, Ex. V-2-F, R. 1288-90). Petitioners' own record references on the subject (Pet. 24-25, Pet. App. 36-37) show that Apex left the business because its "dealings with Mr. Leir have not proven at all satisfactory" (R. 1335, Ex. 62, R. 671-73) and prove nothing else.

**The Van-Ex Venture—1942-1943**

After the Apex termination Continental's vanadium business was largely in repackaging and selling vanadium oxide under the trade name "Van-Ex," at prices higher than those permitted by the Office of Price Administration.

The venture started as a plan to add aluminum and silicon to vanadium oxide and sell the resulting mixture (R. 844), but those familiar with metallurgy fortunately warned petitioners that such mixtures would cause explosions (Ex. V-1-T, V-1-U, R. 2517-18). Petitioners then planned to add fluorspar merely as a flux and to conceal the composition (R. 1162) but shortly eliminated that as

well; after the first shipment in 1942 Van-Ex consisted of straight vanadium oxide (Ex. V-1-X, R. 1171-72, 1007-10, 1282). The name Van-Ex was nevertheless retained, and the product was sold at $1.34 per pound as compared to the O.P.A. price for vanadium oxide of $1.10 per pound (Ex. V-2-M, R. 2555-64, 1728, 909-10).

The claim, again, was that Continental could not get adequate supplies (Complaint, para. 34, R. 18-19). Its own evidence and records, however, were all to the contrary. Shattuck continued to sell in 1942 (Ex. 118, R. 2203, 1066) as did Nisley (R. 693-94). Leir wrote in January 1943 that he had "sufficient raw material" (Ex. V-2-C, R. 1194) and admitted on the stand that his supplies at the time were "ample" (R. 1196). Nisley's government-subsidized plant produced 88,929 pounds of vanadium oxide in 1943, all of which was available to Continental, but Continental bought none of it (R. 1610, 663). It canceled one order in July, ostensibly because it was not in the form of flakes (Ex. U-3-Z, R. 931-32) although it had previously accepted oxide in the same form from another mill (R. 1612). Then in October, when the Nisley oxide was in flakes and "just what we like best," it still declined to buy (Ex. U-5-J, R. 2471-73, 1209).

The petitioners claimed some interference in 1943 with their Van-Ex sales to Canada but had no evidence of it. The evidence offered was that Electro Metallurgical Company of Canada, appointed as agent of the Canadian government to buy vanadium for the Canadian steel mills (Complaint, pp. 36-37, R. 19-21, 809, Pet. 61), declined to buy overpriced vanadium oxide from Continental. Not only was such a governmental act beyond the scope of the

antitrust laws, as the court below held,[6] but there was no substantiation of the claim that such refusal to buy was wrongfully induced. Petitioners offered no evidence on the point other than a hearsay statement attributed to an unauthorized, non-officer employee of Carbide (R. 808-39) supposedly telling petitioners they should not do business in Canada. There was no evidence introduced or offered that any respondent authorized or adopted such statement.[7]

**The Climax Venture—1943**

Climax Molybdenum Corporation manufactured 20,000 pounds of ferrovanadium under a specific contract with Continental which called for no further production thereafter (Ex. 111, R. 1016-17, 1014). Half of the vanadium oxide for the contract was supplied by EMS, the Carbide subsidiary (Ex. U-4-D, R. 942, Ex. U-4-E, R. 943-44).[8] Petitioners claimed that respondents interfered with further contractual relationships with Climax, but had no evidence other than the same hearsay threats described immediately above, which were supposed to relate to Climax as well as to the Van-Ex sales. Petitioners called no witness from Climax. No evidence at all was offered that

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[6] *Yearsley v. Ross Constr. Co.*, 309 U.S. 18 (1940); *Barr v. Matteo*, 360 U.S. 564 (1959); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127 (1961); *Parker v. Brown*, 317 U.S. 341 (1943); *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939); *Asheville Tobacco Board of Trade Inc. v. F.T.C.*, 263 F.2d 502 (4th Cir. 1959); *Stroud v. Benson*, 155 F.Supp. 482 (E.D.N.C. 1957), *case remanded and dismissed* 254 F.2d 448 (4th Cir. 1958), *cert. denied*, 358 U.S. 817 (1958).

[7] Thus the hearsay statement was not admissible as an admission by any respondent (Restatement, *Agency* 2d, Sections 286, Comment b, and 288), and by the same token proved nothing.

[8] Omitted from petitioners' table (Pet. 29).

Climax wanted further business with Continental, or that any threats were communicated or known to it, or, if they were, that they had any effect whatever. In short, respondents had nothing to do with the Climax contract, other than to furnish half of the supplies.

**The Imperial Venture—1944 and After**

In January 1944, Continental made a five-year "contract" with Imperial Paper & Color Corporation for Imperial to convert oxide into ferrovanadium "contingent upon the decision of Imperial to manufacture vanadium" (Ex. 110, R. 2175-78, 1014), but Imperial never decided to begin manufacturing under the arrangement. Petitioners claim that its failure to do so was occasioned by inadequacy of supplies (Complaint, para. 35, R. 19). Petitioners called no witness from Imperial.

Once again, the claim collapses in the face of Continental's own correspondence and records.

For the entire period 1944 through 1949, petitioners can point to no refusals to sell by respondents; the record is one of refusals to buy. Continental made no offers at all to VCA in 1944, 1945, or 1946, declined an offer to sell in 1947 (Ex. 63, R. 780-83)[9] and made no requests thereafter. It made no offers to buy from the Carbide companies in 1944; it asked for and received a small supply for a test run at Imperial in 1945 (Ex. U-4-V, R. 974-75, Ex. U-4-W, R. 975-76);[10] it had requirements contracts in 1946, 1947, 1948 and 1949 for unlimited quantities (Ex. U-4-X, R. 977, Ex. U-4-Y, R. 981-82, Ex. U-4-Z, R. 982-

[9]Omitted from petitioners' table (Pet. 29).

[10]Omitted from petitioners' table (Pet. 29).

83, Ex. U-5-A, R. 983, Ex. U-5-B, R. 984, Ex. U-5-H, R. 997)[11] but failed to buy more than an insignificant amount (Ex. U-5-E, R. 2467, 991, Ex. U-5-F, R. 2468, 992, Ex. U-5-G, R. 993-94). All of these facts are baldly omitted from the table in the petition dealing with petitioners' requests to buy (Pet. 29). Also unmentioned in the petition was the flat admission of Continental's Vice President, when faced with these facts on cross-examination: "The defendants have not—no, have not refused" (R. 979).

In addition, petitioners had what amounted to unlimited supplies from other sources, but failed to buy. In 1944 the Nisley oxide already milled was still for sale (Ex. U-4-B, R. 936-37) and Nisley wanted to mill and sell more, but Continental uniformly rejected it (Ex. U-2-V, R. 732-33, Ex. U-2-W, R. 733-34, Ex. U-2-X, R. 735-36, Ex. U-2-Z, R. 738, Ex. U-3-A, R. 739, Ex. U-3-B, R. 740-41). It also refused offers from Blanding (Ex. V-2-K, R. 2533-53, 1715, Ex. V-2-L, R. 2554, 1724, 1718-19, 1725-27) and refused an opportunity to buy North Continent Mines, the source of the Shattuck supply, outright (Ex. U-5-I, R. 1204-08). Imperial also turned down numerous foreign supplies of vanadium, although Continental professed to be interested (Ex. U-3-F, R. 879-81, Ex. U-3-G, R. 881-85, Ex. U-3-H, R. 886-87, Ex. U-3-I, R. 887-89, Ex. U-3-J, R. 889-91, Ex. U-3-K, R. 893-97, Ex. U-3-M, R. 897-99, Ex. U-3-N, R. 899-901, Ex. U-3-O, R. 901-04, Ex. U-3-P, R. 904-06). Finally, although in 1944 the huge Government stockpile of 2,500,000 pounds of oxide (Ex. U-4-T, R. 968-70) was available to it in any "given quan-

[11] Omitted from petitioners' table (Pet. 29).

tity" (Ex. U-4-R, R. 964-65), Continental bought only about 5,000 pounds (Ex. U-4-S, R. 965-68). Continental's Vice President could not recall that they "bought any substantial quantities after that" from the Government supply (R. 972).

In such circumstances the charge that "Imperial was compelled to abandon the contract with the consent of *Continental* because of the inability of *Imperial* or Continental to secure vanadium oxide or vanadium-bearing ores" (Complaint, para. 35, R. 19) is not only fabricated but absurd. By 1944 production had so far exceeded demand that Continental could have increased its business tenfold, and not lacked for supplies.

Continental's reason for abandoning the vanadium business was the exact opposite of its claim: it left because vanadium had become a glut on the market. The wartime shortage upon which petitioners had temporarily traded was at an end.

## ARGUMENT

### A. THE DECISION BELOW DOES NOT IMPINGE IN ANY WAY UPON THE RULE OF THE EASTMAN KODAK, STORY PARCHMENT AND BIGELOW CASES. PETITIONERS IN THIS CASE FAILED TO SHOW ANY INJURY CAUSED BY RESPONDENTS, A REQUIREMENT WRITTEN INTO THE STATUTE AND UNIFORMLY RECOGNIZED BY THE DECISIONS OF THIS COURT.

The court below correctly recognized and applied the landmark decisions in *Eastman Kodak v. Southern Photo Co.*, 273 U.S. 359 (1927), *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555 (1931), and *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946).

In those cases this Court distinguished between the fact of damage and the amount of damage, holding that although the latter could be approximated the former must be shown with reasonable certainty.[12] The sum and substance of the rule enunciated in those opinions is expressed in *Bigelow*, which states that the fact that some damage resulted from an antitrust violation must be shown as a "just and reasonable inference" from facts having a tendency to injure (327 U.S. at 264). If there is such damage so caused, then the amount of it may be approximated by reasonable estimate. But there must be some resulting injury shown, as the statute, 15 U.S.C. Sec. 15, expressly requires.

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[12]In the present case the court below could also have correctly held that there was no proof whatever of the amount of damage. Continental presented no evidence of any *net* profits whatever on any of its vanadium operations at any time (R. 1223-27, Ex. 120, R. 2213, 1094, Ex. 121 for ident.), and merely attempted to compare with its own profits in other businesses, and with respondents' profits in vanadium and uranium combined.

These principles were fully recognized by the court below. The court questioned whether on its facts *Bigelow* was specifically applicable but correctly stated that if it was, "it was still incumbent upon [petitioners] to show on the trial that their reiterated lack of supplies was the result of defendants' refusals to deal with them and of defendants' efforts to prevent them from obtaining raw materials elsewhere" (289 F.2d at 91, R. 2573). This was plainly a correct statement of the law on the present record.

The case was tried on the theory that petitioners were forced out of the vanadium business because of their asserted inability to secure supplies of raw material. Petitioners' attempt at proof of damage was all based upon their insistence that they could sell whatever they could produce (R. 857-59) but that they were unable to get sufficient supplies for such production (R. 852-63, 1107-13). There was no effort to compute damages flowing from any other alleged injury.

The proof, however, was conclusive from admissions at trial and from petitioners' own letters and documents that Continental had adequate supplies of vanadium available during the entire period in suit. Petitioners admitted, through Leir, the adequacy of their supplies at various times in 1940, 1942 and 1943, years of general shortage. They or their associates declined to buy offered and available supplies in 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948 and 1949: that is, in every single year for which damages are claimed. They left the business in 1944, when the supply was greater than ever before, and

never tried to re-enter it, despite their requirements contracts with the very parties they now say refused to sell.

If there was any cause of damage other than the claimed supply restrictions which petitioners could show, under their complaint and their theory of the case at trial, they failed to offer any evidence of it. They argue that VCA interfered with Apex; the evidence offered was only that VCA bought certain equipment which petitioners had previously refused to buy. They argue that the Carbide companies interfered with Climax; the evidence offered was only by hearsay of a supposed threat by a non-authorized employee, never shown to have been expressed or intimated to Climax. They argue that there was an interference with their sales to Canada; the evidence offered was only of the same unrelated hearsay, together with the fact that the Canadian Government's agent declined to buy some of their overpriced vanadium. Throughout there was insinuation, but no factual backing.

In short, none of the particular claims in the present case was substantiated in the sense required by *Bigelow*: as to none did the evidence permit a just and reasonable inference that damage resulted from any proven violation. The court below fulfilled its function of reviewing the entire record, the evidence received and offered and all inferences therefrom, and properly concluded that it could find no such resultant damage. Such a decision, on this record, presents no principle of law for this Court's attention.

**B. THE COURT BELOW PROPERLY AFFIRMED THE JUDGMENT UPON THE GROUND THAT ANY ERRORS IN THE TRIAL PROCEEDINGS WOULD NOT AFFECT THE SUBSTANTIAL RIGHTS OF THE PARTIES.**

Petitioners ask this Court to rule that the court below was without power to affirm the judgment of the trial court upon the ground selected, which was that petitioners had failed to prove their case and that therefore any errors in the rulings or instructions were immaterial.

The rule, however, is settled by this Court that "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Brown v. Allen*, 344 U.S. 443, 459 (1953). It is likewise settled that an appellee may, without taking a cross-appeal, urge in support of the judgment any matter appearing in the record. *U.S. v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924); *Langnes v. Green*, 282 U.S. 531, 538-39 (1931); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957). The rule of these cases is codified in the harmless error statute, 28 U.S.C. Sec. 2111, and in Rule 61, F.R.C.P. (Appendix A hereto), both cited and relied upon by the court below.

The courts of appeal have regularly applied these governing principles to affirm judgments of the trial courts. Thus they have repeatedly held that where a defendant is entitled to a directed verdict, errors in the charge to the jury, *U.S. v. J. E. Bohannon Co.*, 232 F.2d 756, 757-58 (6th Cir. 1956); *Wannacott v. Denver & Rio Grande Western R. Co.*, 187 F.2d 607, 608 (10th Cir. 1951); *Weidenfeld v. Pacific Imp. Co.*, 43 F.2d 817, 820 (2d Cir.), *cert. denied*, 282 U.S. 890 (1930); or in the exclusion of

evidence, *Syres v. Oil Workers International Union*, 257 F.2d 479, 484 (5th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); *Baird v. Aluminum Seal Company*, 250 F.2d 595, 601 (3d Cir. 1957); or both, *Monolith Portland Midwest Co. v. Western Pub. Serv. Co.*, 142 F.2d 857, 859-60 (10th Cir. 1944); *Nalbantian v. United States*, 54 F.2d 63, 64 (7th Cir.), *cert. denied*, 285 U.S. 536 (1932), are an insufficient ground for reversal upon appeal. In none of these cases did the winner of the jury verdict move for judgment notwithstanding the verdict or cross-appeal. These cases are precisely in point and they squarely depend for their reasoning on the governing principles long settled in this Court.

Petitioners cite cases which hold that the party who *loses* the verdict in the trial court and does not then ask for judgment notwithstanding that verdict cannot on appeal secure more than a new trial. *Cone v. West Virginia Paper Co.*, 330 U.S. 212 (1947); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948); *Johnson v. New York N.H. and H.R. Co.*, 344 U.S. 48 (1952).[13] Such cases, however, do not purport to concern the affirmance of a judgment. They deal with the rights of a party who lost the verdict and judgment in the trial court, and who has failed to comply with Rule 50(b) F.R.C.P. The latter concerns, and concerns only, the setting aside of verdicts and the

[13] *Thurber Corp. v. Fairchild Motor Corp.*, 269 F.2d 841 (5th Cir. 1959), also cited by petitioners, does not purport to be a reversal of the same court's ruling just a year before in *Syres v. Oil Workers International Union*, *supra*, or its earlier and similar decision in *Rushing v. Metro-Goldwyn-Mayer Distributing Corp.*, 214 F.2d 542 (5th Cir. 1954). The court stated (269 F.2d at 852) that "we are not ruling" that an instructed verdict should have been granted.

granting of judgment notwithstanding a verdict. The rule by its terms has nothing to do with a party's rights or duties where the verdict and judgment are favorable; plainly it does not contemplate the absurdity of a motion by the winning party attacking the verdict or judgment; and there is no suggestion in this Court's opinions discussing it that the rule has any such application.

On the contrary this Court has refuted just such an argument in one of the cases on which petitioners particularly rely. In *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555 (1931), this Court held that it should consider upon the merits respondents' additional ground for sustaining the judgment below, which was that there was no evidence of an antitrust violation. Petitioners insisted that such ground was not open for consideration because there was no cross-petition for certiorari, but this Court disagreed, saying (282 U.S. at 560) "respondents do not invoke that ground in order to overthrow the judgment below, but to sustain it; and this they may do."

It follows that the argument is without support in principle, in the statute, in the Federal rules, or in the cases.

## CONCLUSION

No conflict in the decisions is shown by the petition, nor any erroneous application of law. The failure of proof was complete. The petition should be denied.

Dated: San Francisco, California,
September 8, 1961.

Respectfully submitted,

HERBERT W. CLARK,
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**(Appendices A, B and C Follow)**

## Appendix A

Act of May 24, 1949, Chapter 139, Section 110, 63 Stat. 105, 28 U.S.C. Sec. 2111:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 61, Federal Rules of Civil Procedure:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

## Appendix B

Respondents file herewith under Rule 21(6) certified copies of appellants' designation of record and the designations of the record for printing filed by both parties, together with a certificate of the clerk of the court below stating that the designations for printing included all of the testimony in the trial transcript. Below are reprinted the appellants' designation of record and the clerk's certificate, omitting in each instance the title of court and cause.

### DESIGNATION OF RECORD

To the Clerk of the Above-Entitled Court:

Plaintiffs-appellants in the above-entitled case having appealed to the United States Court of Appeals for the Ninth Circuit from a final judgment heretofore made and entered herein, you are hereby requested to prepare certified record of appeal in accordance with the rules of the said Court of Appeals and to file the same with the Clerk of the said Court in due course, as provided by law, to include the following:

1. The complete record and all of the proceedings and evidence in the above-entitled action.

2. This designation of record.

Dated: June 30, 1958.

Joseph L. Alioto

Joseph L. Alioto
Attorney for Plaintiffs-Appellants

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO SUPPLEMENTAL RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, WILLIAM E. WILSON, as Chief Deputy Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing documents: designation of appellants filed in the District Court, appellants' statement of points and designation or record, letter amending designation; designation of appellees' Union Carbide, et al., supplemental designation of appellees' Union Carbide, et al., letter of Clerk, U. S. Court of Appeals of April 26, 1960 to be a full, true and correct copy of documents requested by the appellees and certified as a supplemental record under Rule 21 of the Revised Rules of the Supreme Court of the United States as the originals thereof remain on file and appear of record in my office.

I further certify that I have compared the designations of the record of printing filed by the respective parties as transmitted herewith, with the reporter's transcript in this case in the United States District Court for the Northern District of California, and that the parties did designate for printing all portions of the said reporter's transcript which contain the testimony of the witnesses, and omitted portions consisting of certain statements and arguments of counsel and colloquies between court and counsel.

ATTEST my hand and the seal of the said The United States Court of Appeals for the Ninth Circuit, as the

City and County of San Francisco, State of California, this 7th day of September, 1961.

(SEAL)

WILLIAM E. WILSON

WILLIAM E. WILSON
Chief Deputy Clerk

## Appendix C

The letter reprinted below is one of the documents certified to the Court under Rule 21(6) by means of the clerk's certificate filed herewith and reprinted in Appendix B above.

Office of the Clerk
U. S. Court of Appeals
For the Ninth Circuit
San Francisco 1, Calif.

April 26, 1960

Joseph L. Alioto, Esq.
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Crocker Building
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No. 16149
Continental Ore Co. v. Union Carbide

Gentlemen:

The Court has requested my office to suggest to counsel in the above entitled case that it would be helpful to the Court if counsel would file additional memoranda (an original and three copies, which may be typewritten) pointing to every specific place in the record where there is testimony or documentary evidence which will show or tend to show:

1. The cause of the termination of Apex Smelting Company's arrangement with Continental.

2. The cause of the termination of Imperial Paper and Color Corporation's arrangement with Continental.

3. The cause of the cessation of shipments by Continental of vanadium compounds from its Long Island premises.

4. The cause of the failure of Continental to work out an arrangement with Climax Molybdenum Corporation.

The Court requests that this memoranda be filed within two weeks from today. Thank you.

Sincerely,
Frank H. Schmid
Clerk

FS:nd